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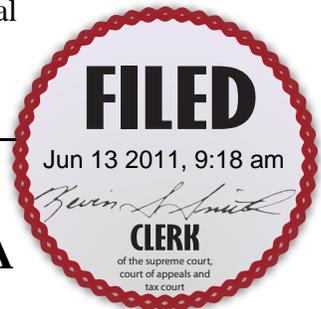
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**IN THE
COURT OF APPEALS OF INDIANA**



KYLE D. ROSENFELD,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 22A05-1007-CR-648

APPEAL FROM THE FLOYD SUPERIOR COURT

The Honorable Susan L. Orth, Judge

Cause No. 22D01-0806-FC-393

June 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Rosenfield appeals his sentence following his conviction for auto theft, as a Class C felony, pursuant to an open plea. The trial court sentenced him to a maximum term of eight years. He raises a single issue for review, namely, whether his sentence is inappropriate in light of the nature of the offense and his character, and he asks that we reduce his sentence to the advisory sentence of four years.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 17, 2008, Trooper David A. Scott of the Indiana State Police observed a cream-colored 2007 Lincoln MDX at the BP gas station on East Spring Street in New Albany. A Lincoln matching that description had previously been reported as stolen from Janice and William Moyer, and Rosenfield had been named as a suspect in the theft. The driver was a white male with tattoos on his arm and neck, matching Rosenfield's description, and he had a female passenger.

Trooper Scott attempted to block the Lincoln in, but the driver exited the gas station, driving east onto Spring Street. The officer followed with his emergency lights on, and the driver eventually stopped. Trooper Scott identified the driver as Rosenfield and arrested him. While speaking with him, the officer noticed a black and gold wristwatch lying on the ground near Rosenfield. The watch was later identified as having been taken from a burglary at the Moyer residence. And the passenger told the officer that Rosenfield had discarded something in a trashcan at the gas station. Upon searching

that trashcan, officers found a gold- and silver-colored man's wedding band that was later identified as one that had been taken in the Moyer burglary.

The State charged Rosenfield with auto theft, as a Class C felony; two counts of receiving stolen property, as Class D felonies; and with being an habitual offender. Rosenfield pleaded guilty to auto theft, as a Class C felony, in return for the State's dismissal of the remaining charges. At sentencing, the court found that Rosenfield's past violations of probation was a "very prominent" aggravator and the hardship on his son was a mitigator. Transcript at 36. The court adopted the recommendation of Rosenfield's probation officer and imposed the maximum sentence of eight years. Rosenfield now appeals.

DISCUSSION AND DECISION

Rosenfield contends that his sentence is inappropriate in light of the nature of the offense and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See App. R. 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was

inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Roush, 875 N.E.2d at 812 (alteration original).

The Indiana Supreme Court recently stated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. The principal role of appellate review is to attempt to “leaven the outliers.” Id. at 1225. Whether we regard a sentence as inappropriate at the end of the day turns on “our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case.” Id. at 1224.

Rosenfield first argues that the trial court should have identified two mitigators, namely, that the crime did not cause or threaten harm to person or property, under Indiana Code Section 35-38-1-7.1(b)(1), and that he made or will make restitution to the victim for the injury, damage, or loss sustained, under Indiana Code Section 35-38-1-7.1(b)(9). We first observe that Rosenfield has not clearly argued the inappropriateness of his sentence in light of both the nature of the offense and his character, as required under Appellate Rule 7(B). Assuming that these mitigators pertain to both the nature of the offense and Rosenfield’s character, he also has not shown that he argued in favor of these mitigators to the trial court. If a defendant does not advance a factor to be mitigating at sentencing, this court will presume that the factor is not significant and the

defendant will be precluded from advancing it as a mitigating circumstance for the first time on appeal. Hollin v. State, 877 N.E.2d 462, 465 (Ind. 2007). Because Rosenfield has not shown that he argued these mitigators to the trial court, he is precluded from advancing these mitigators here. See id.

Rosenfield also argues that his was not the worst offense. As we have stated, when we consider such an argument, we

concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

While the nature of Rosenfield's offense may not be the worst, neither can we say that his sentence is inappropriate in light of his conduct when considered in conjunction with his character. Without any discernable reason other than joyriding, Rosenfield stole the Moyers' 2007 Lincoln MDX. He was apprehended four days later when Trooper Scott observed him in the vehicle at a gas station. Rosenfield fled in the vehicle before being apprehended and was found to have possessed other items stolen from the same victims. And Rosenfield has a history of two similar offenses: a 2004 conviction for Class B felony burglary, for which he violated probation three times, and a 2008 Kentucky conviction for receiving stolen property with a value less than \$300. He also was arrested in 2006 for auto theft in Jefferson County, Kentucky (disposition unknown), for which there was a fugitive warrant, and in 2007 for auto theft in Clark County, Indiana (disposition unknown). Rosenfield suggests he was given a maximum sentence for an act of "joyriding." But Rosenfield was convicted of auto theft. And in light of

Rosenfield's related conviction for receiving stolen property, arrests for similar offenses, and history of repeated probation violations, we cannot say that his eight-year sentence is inappropriate in light of both the nature of the offense and his character.

Affirmed.

ROBB, C.J., and CRONE, J., concur.